United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

with affidavit

75-4137

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4137

BHARATKUMAR BACHUBHAI DESAI,
Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

THOMAS J. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

MARY P. MAGUIRE,
THOMAS H. BELOTE,
Special Assistant United States Attorneys
Of Counsel.

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Statement of the Issues

1. Whether the denial of petitioner's application for voluntary departure was arbitrary and capricious or an abuse of discretion.

2. Whether the Board of Immigration Appeals abused its discretion by declining to reopen the deportation proceeding in order to permit the petitioner to renew his application for adjustment of status.

Statement of the Case

The petitioner, Bharatkumar Bachubhai Desai ("Desai") petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals on April 25, 1975. In that order the Board, in a *per curiam* decision, affirmed the decision of the Immigra-

tion Judge which found Desai deportable under Section 241(a)(2) of the Immigration and Nationality Act (the "Act") as an overstay non-immigrant student, which denied his application for adjustment of status under Section 245 of the Act, 8 USC § 1255, and which also denied his application for the privilege of voluntary departure in lieu of deportation.

The petitioner also apparently seeks review of an order of the Board of Immigration Appeals dated July 24, 1975* which denied Desai's motion to reopen his deportation proceedings to permit him to renew his application for adjustment of status on the basis of a new labor certification. The Board based its finding on the fact that a review of the entire record and the circumstances in the case did not make it a meritorious one for reopening.

Statement of Facts

The petitioner is a 24 year old native and citizen of India. He entered the United States on February 5, 1970 as a non-immigrant student and was authorized to remain in the United States until September 26, 1973. He remained beyond his authorized period without permission and on January 8, 1974 deportation proceedings were instituted against him by the issuance of an order to show cause and notice of hearing (T. 22). At the deportation hearing held on September 24, 1974 ** Desai, who was represented by his present attorney, conceded his deportability (T. 14, p. 1) and applied for an adjustment of his status to that of a permanent resident under Section

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* Although petitioner apparently seeks review of the Board's order of July 24, 1975 this petition for review was filed on July 9, 1975.

** Although a deportation hearing had been scheduled for January 24, 1974 Desai failed to appear on that date and his whereabouts were not ascertained until several months later.

245 of the Act, 8 U.S.C. § 1255. Petitioner also applied for the privilege of voluntary departure in lieu of deportation.

In support of his application for adjustment of status Desai submitted a labor certification approved on May 9, 1974 by the United States Department of Labor and which was issued to Desai as the manager of a store which sells imported articles from India. In his application for the labor certificate (T. 19), Desai made certain statements with respect to his prior work experience in India as the manager of an import-export business for Bharat Enterprises. At the deportation hearing held on September 24, 1974 Desai testified, under oath, that he had been employed in the import-export business beginning in 1967 and had become a manager of the business about one year later (T. 14, p. 8).

On January 6, 1975 a reopened hearing was held by the Immigration Judge in order to give the petitioner an opportunity to rebut certain derogatory evidence which had been received from the United States consul in Bombay, India with respect to Desai's alleged prior work experience. The consular report (T. 17) disclosed that Desai had never been employed by Bharat Enterprises and Desai readily admitted that he had given false information in his application for labor certification and that he had testified falsely at the prior hearing with respect to his prior work experience (T. 14, p. 21-22).

In a decision and order dated January 6, 1975 the Immigration Judge found petitioner deportable as charged and denied petitioner's application for adjustment of status on the ground that the labor certificate was invalid since it had been obtained on the basis of false information submitted by the petitioner to the Department of Labor. The Immigration Judge also found that Desai was statutorily ineligible for the discretionary privilege of volun-

tary departure since Desai had testified falsely under oath on September 24, 1974 with respect to his alleged work experience in India and, consequently, Desai was ordered deported to India (T. 13).

Desai appealed the order of the Immigration Judge to the Board of Immigration Appeals and in a *per curiam* decision dated April 24, 1975 the Board affirmed the decision of the Immigration Judge and dismissed the appeal (T. 10).

On April 25, 1975 Desai obtained a second labor certification from the Department of Labor (T. 8) and by motion dated May 5, 1975 moved to reopen his deportation proceedings on the basis of the newly-obtained labor certification. On July 9, 1975 the Service denied Desai's application for a stay of deportation pending a decision on the motion to reopen.* On that same date Desai filed this petition for review and his deportation was stayed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105a(a)(3).

Relevant Statutes

Immigration and Nationality Act, 63 Stat. 163 (1952), as amended:

Section 244, 8 U.S.C. § 1254—

> (e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of Section 1251(a) of this title . . . to depart voluntarily from the United States at his own expense in lieu of deportation is

* The filing of a motion to reopen does not stay the execution of any outstanding order of deportation unless a stay is specifically granted by the Board. 8 C.F.R. § 3.8.

such alien shall establish to the satisfaction of the Attorney General that he is, or has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

* * * * *

Section 245, 8 U.S.C. § 1255—

(a) The status of an alien . . . who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

* * * * *

Relevant Regulation

Title 8, Code of Federal Regulations (C.F.R.):

§ 3.2. *Reopening or reconsideration.* The Board may on its own motion reopen or reconsider any case in which it has rendered a decision . . . . Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply there-

for was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. * * * § 3.8. *Motion to reopen or motion to reconsider* (a) *Form* * * * Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. * * *

ARGUMENT

POINT I

THE BOARD OF IMMIGRATION APPEALS DID NOT ABUSE ITS DISCRETIONARY AUTHORITY IN DECLINING TO REOPEN THE DEPORTATION PROCEEDING TO PERMIT THE ALIEN TO RENEW HIS APPLICATION FOR ADJUSTMENT OF STATUS.

A. The reopening of a deportation proceeding is a matter of discretion.

The Immigration and Nationality Act contains no specific provision for the reopening of a deportation proceeding. The Attorney General, under his broad grant of authority to administer and enforce the Act,* has promulgated regulations which permit reopening as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. § 3.2, provides in pertinent part that motions to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered at the prior hearing." Additionally, 8 C.F.R. § 3.8 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material."

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* Section 103(a) of the Act, 8 U.S.C. § 1103(a).

Clearly, the regulations contemplate that a motion to reopen contain an offer of evidence, that the evidence be heretofore unobtainable, and that the evidence be sufficient to warrant the grant of the relief sought. Accordingly, the Board is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. When such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceeding. With this in mind, we now turn to examine the nature of the relief sought by this petitioner and the evidence he offered in support of his motion.

B. Adjustment of status pursuant to Section 245 of the Act, 8 U.S.C. § 1255.

Section 245 of the Act, 8 U.S.C. § 1255, provides that the Attorney General, in his discretion, may adjust the status of an alien to that of a permanent resident provided the alien is eligible to receive an immigrant visa, is admissible to the United States and provided an immigrant visa is immediately available. Because this form of relief circumvents the usual immigration procedures, it is considered extraordinary and will be granted only in meritorious cases. *Ameeriar* v. *Immigration and Naturalization Service*, 438 F.2d 1028 (3d Cir. 1971), *cert. denied*, 404 U.S. 801 (1972); *Chen* v. *Foley*, 385 F.2d 929 (6th Cir. 1967), *cert. denied*, 393 U.S. 838 (1968).

In order for an alien to be eligible for consideration, he must first satisfy the substantive prerequisites contained in the statute. Having done so, he must then persuade the Attorney General to exercise his discretion favorably. Of course, if the alien fails to satisfy the statutory requirements, he will be ineligible for the relief sought and hence the exercise of discretion will never be reached. *Diric* v. *Immigration and Naturalization Service*,

400 F.2d 658 (9th Cir. 1968), *cert. denied*, 394 U.S. 1015 (1969); *Tivke* v. *Immigration and Naturalization Service*, 335 F.2d 42 (2d Cir. 1964); *Gambino* v. *Immigration and Naturalization Service*, 419 F.2d 1355 (2d Cir. 1970), *cert. denied*, 399 U.S. 905; *Talonoa* v. *Immigration and Naturalization Service*, 397 F.2d 196 (9th Cir. 1968); *Ambra* v. *Ahrens*, 325 F.2d 468 (5th Cir. 1963). Moreover, the burden is always upon the alien to establish that he is statutorily eligible for this relief and that his application merits the favorable exercise of discretion. *Santos* v. *Immigration and Naturalization Service*, 335 F.2d 262 (9th Cir. 1967).

Having examined the nature of the relief sought herein, we now turn to consider the evidence contained in the administrative record upon which the Board's decision was based.

C. The evidence offered in support of the alien's motion did not warrant reopening.

In support of his motion, the petitioner submitted a labor certification issued to him by the Department of Labor subsequent to the entry of the final order of deportation. Since an applicant for adjustment of status must establish his eligibility for an immigrant visa, the applicant must either obtain a valid labor certification from the Department of Labor or must establish that he is exempt from such certification. Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(14).

There was, however, no offer of proof of facts to show that Desai merited the favorable exercise of discretion, nor were there any equities toward this end contained in the record of proceedings already before the Board. To the contrary, the record indicated that Desai had knowingly and intentionally obtained a prior labor

certification by submitting false information to the Department of Labor. Furthermore, when questioned under oath by the Immigration Judge with respect to work experience shown on the application for the prior labor certification, Desai gave false testimony but admitted that he had done so only when confronted with evidence of the falsity of his statements. The Board took note of this and determined that petitioner had failed to establish a meritorious case for reopening.

We submit that the Board's decision was well-grounded. The petitioner apparently contends that since he offered evidence to establish statutory eligibility, *i.e.*, the second labor certification, the Board was required to reopen the deportation proceeding. He argues that the Board's refusal to grant him a full hearing on his application was an abuse of discretion.

We submit that the Board's decision is well-supported by the record, which is virtually barren of any equity in favor of the petitioner. Indeed, by his own admission, Desai sought and obtained a labor certification on the basis of false statements. From an examination of the entire record, including the petitioner's sworn testimony, it is clear that he intentionally attempted to secure, and in fact did secure, a labor certification by fraud. In passing on cases within its jurisdiction, the Board is expressly authorized to exercise any of the Attorney General's authority and discretion appropriate and necessary to the disposition of a case. 8 C.F.R. § 3.1(d). It has long been the practice of the Board to make its own determination on questions of both law and facts and on whether discretionary relief should be granted. *Wooby* v. *Immigration and Naturalization Service*, 385 U.S. 276, 278 n.2 (1966). In the present case, involving a motion to reopen, there is an additional express grant of power to the Board in 8 C.F.R. 3.2 which requires evaluation of proferred evidence before such a motion can be granted.

D. Scope of review.

In this petition for review Desai raises an issue as to whether or not the Board abused its discretionary authority in denying the petitioner's motion to reopen. As we have indicated, the grant or denial of a motion to reopen is discretionary. *Novinc* v. *Immigration and Naturalization Service*, 371 F.2d 272 (2d Cir. 1967). The scope of judicial review is extremely narrow. *Muskardin* v. *Immigration and Naturalization Service*, 415 F.2d 865 (2d Cir. 1969); *Zupicich* v. *Esperdy*, 319 F.2d 773 (2d Cir. 1963). Where, as here, the evidence offered would not result in a grant of the relief sought, the denial of such a motion is not an abuse of discretion. *Cheng Kai Fu* v. *Immigration and Naturalization Service*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968).

POINT II

THE PETITIONER IS STATUTORILY INELIGIBLE FOR VOLUNTARY DEPARTURE.

Pursuant to Section 244(e) of the Act, 8 U.S.C. § 1254(e), voluntary departure in lieu of deportation may be granted in the exercise of discretion to certain eligible aliens, provided they have established good moral character for the preceding five years. Section 101(f) of the Act, 8 U.S.C. § 1101(f), enumerates several classes of persons who, for purposes of the Act, are precluded from establishing good moral character. Included in this listing is any alien who has given false testimony for the purpose of obtaining any benefits under the Act.

In the deportation hearing held on September 24, 1974 Desai testified to the effect that the application for labor certification accurately reflected his work experience in India. At a subsequent hearing on January 6, 1975

Desai admitted that he had made false statements in the application for labor certification and that he had testified falsely at the prior deportation hearing. He is, therefore, a member of the class of persons described in Section 101(f)(6) of the Act. This being the case, he is statutorily precluded from establishing good moral character. Since he is unable to establish good moral character he cannot qualify for voluntary departure under Section 244(e) of the Act.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York,
Attorney for Respondent.

MARY P. MAGUIRE,
THOMAS H. BELOTE,
Special Assistant United States Attorneys,
Of Counsel.

★ U. S. Government Printing Office 1975-- 614—350—114

Form 280 A-Affidavit of Service by Mail
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State of New York)
County of N York) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 12th day of December 1975 she served a copy of the within

govt's brief on appeal

by placing the same in a properly postpaid franked envelope addressed:

Joseph Abrams, Esq.,
1 Penn Plaza,
New York, NY 10001

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this
12 day of December 1975

Ralph L Lee

RALPH L LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977